IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

THURSDAY, THE 5TH JULY 2007 / 14TH ASHADHA 1929

AS.No. 781 of 1998(U)

OS.669/1992 of ADDL.SUB COURT,KOTTAYAM
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APPELLANT - 2ND DEFENDANT:

UNION OF INDIA, REPRESENTED BY SECRETARY, TELECOMMUNICATION DEPARTMENT, NEW DELHI.

BY ADV. SRI.K.RAMAKUMAR, SCGSC
SRI.P.K.RAMKUMAR, ADDL.CGSC
SRI.P.S.SREEDHARAN PILLAI, SCGSC
SRI.C.S.RAMANATHAN, SC, BSNL

RESPONDENTS - PLAINTIFF & DEFENDANTS 1 & 3:
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1. K.C. ACHAMMA, W/O. M.A. CHACKO, AGED 44, RESIDING AT MULAMPALLIL HOUSE, ERANJAL, KOTAYAM - 4.

2. STATE OF KERALA, REPRESENTED BY THE CHIEF SECRETARY, THIRUVANANTHAPURAM.

3. THE WATER AUTHORITY, THIRUVANANTHAPURAM. REPRESENTED BY SECRETARY, DO. DO.

BY GOVERNMENT PLEADER SHRI L.G. SURESH BABU R2
SRI.MATHEW JOHN (K) R1
BY ADVOCATE SHRI M. DINESH SC, WA

THIS APPEAL SUIT HAVING BEEN FINALLY HEARD ON 05/07/2007 ALONG WITH AS NO. 679 OF 1999 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. PADMANABHAN NAIR, J.

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A.S. NO. 781 OF 1998
AND
A.S. NO. 679 OF 1999

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Dated this the 5th day of July, 2007

J U D G M E N T

Appeal Suit No.781 of 1998 is filed by the Union of India represented by the Secretary, Telecommunications Department, who is the second defendant in O.S. No.669 of 1992 on the file of the Additional Sub Court, Kottayam. A.S.No.679 of 1999 is filed by the Water Authority, who is the third defendant in the aforesaid suit. These two appeals are filed challenging the decree and judgment passed by the trial court by which the appellants in these two appeals and State of Kerala were directed to pay an amount of Rs.25,000/- with 6% interest as compensation for the injuries sustained by the plaintiff, who is the first respondent in these appeals.

2. Plaintiff was a teacher working in Mount Carmel High School, Kottayam. She was residing at Eranjal on the northern side of Eranjal road. She had to travel through the said road from her house to reach the School where she was

working. It was averred that during the month of October, 1991, second defendant dug a trench on the western side of the Kottayam-Eranjal road having a width of 2ft. and depth of 4 ft. for the purpose of laying cables. The earth removed from the trench was spread all over the tarred portion of the road. It was averred that trench was left unattended by the Departmental authorities and the work was not completed within a reasonable time. The third defendant also dug another trench on the eastern side of the road during the month of November, 1991 for the purpose laying water pipes. The earth removed from that trench was also spread over the tarred portion of the road making it impossible for the pedestrians to walk through the road. It was averred that trenches on both sides were kept open by the employees of defendants 2 and 3 without any fencing or display of any signal or caution to the pedestrians. The trenches were not filled up within a reasonable time. It was averred that public at large have a right to walk through the road without any obstructions or hindrances. It was averred that due to the negligence on the part of the defendants, road was left in that

condition causing nuisance and inconvenience to the general public. It was averred that on 27.11.1991 the plaintiff was returning from school to her house. When she reached in front of the house of one Mr.Joy, she slipped into the trench dug by the second defendant in spite of the care and caution taken by her while walking through the road. It was averred that the plaintiff slipped and fell into the trench due to the negligence on the part of 2nd and 3rd defendants and their employees. It was averred that defendants are jointly and severally liable for the injuries caused to the plaintiff. Plaintiff claimed a sum of Rs.10,000/- as compensation towards mental shock, agony and pain and suffering caused to her, Rs.30,000/- for disability, Rs.5,000/- for medical expenses, Rs.8,500/- for loss of earning. But the claim was limited to Rs.50,000/-. It was averred that plaintiff had issued necessary notice. There was no reply from the contesting defendants and hence the suit.

3. The first defendant did not file any written statement. Second defendant filed a written statement contending that the suit was not maintainable. It was

contended that the evidence in the records itself shows that the plaintiff was aware of the conditions of the road. It was contended that second defendant had taken up a total trenching of 1315 metres towards Eranjal side and the work was completed within a period of one week. After completing the work another trenching of 830 metres was done by the Contractor from Mount Carmel Telephone Pillar towards Eranjal Bridge. The said trench was only having a width of 1 foot and depth of 3 ft. In the place of accident the trench was having a width of 1 foot and depth of 2 ft. It was contended that the work was almost completed, but for a small length of 100 metres alone, the trench was left open. It was contended that warning boards, flags, etc., were displayed during the period of work. Disregarding the specific warning people were walking over the heaped soil. Plaintiff placed her foot on a piece of stone and that stone gave way, she slipped and fell. It was also contended that road was closed for traffic because there were trenches on either side of the road. There was no vehicular traffic and the area of tarred portion was having a width of 1 metre in

between the two trenches on either side which the pedestrians could use. It was contended that the accident occurred due to the negligence of the plaintiff herself and she is not entitled to get any compensation from the second respondent. The allegation that there was negligence on the part of the second defendant was denied. Hence the second defendant prayed for a dismissal of the suit. No written statement was filed by the first defendant.

4. Third defendant filed a separate written statement. It was contended that the suit was bad for non-joinder of necessary parties. It was contended that Shri N. Vinod Lal was the Contractor and it was he who dug the trench for laying water pipes for the World Bank Aided Water Supply Scheme. It was contended that suit was bad for non-impleadment of the Contractor. It was contended that the third defendant, Water Authority, is not liable to pay any compensation to the plaintiff. It was contended that the trench was dug for laying of pumping main pipe line from Vellooparambi Treatment Plant to the overhead reservoirs at Panachicadu and Nattakom Panchayats. The work was entrusted with Mr.Vinod Lal, who

had executed an agreement between himself and the third defendant. The full responsibility on the site and the work till its completion was undertaken by the Contractor while entering into the agreement and he took over possession of the site. It was contended that there were provisions in the agreement for proper fencing along the side of the trench. It was contended that necessary fencing were made along the side of the road and caution boards were also exhibited. The averment that the earth removed from the trench was spread over the tarred portion of the road was denied. It was contended that the trench made for and on behalf of the third defendant was properly maintained with sufficient fencing and sign boards, etc. The work of the third defendant was commenced on 15.11.1001 and completed on 10.12.1991 and during the said period traffic was completely closed. It was contended that plaintiff was fully aware of the work being carried on in the place. It was contended that adequate precautionary measures were taken to avoid accidents. The averment that the accident occurred due to the heaping of the soil over the tarred portion of the road was denied. It

was contended that there was no negligence on the part of the third defendant and it is not liable to pay any compensation. Quantum of compensation claimed was also denied. It was contended that plaintiff herself alone was responsible for the accident. It was contended that at any rate third defendant was not liable to pay any compensation. It was contended that even according to the plaintiff she fell into the trench dug by the second defendant. Third defendant prayed for a dismissal of the suit.

5. Trial court found that the accident occurred due to the negligence of the defendants and decreed the suit making all the defendants liable jointly and severally. As already stated, second defendant has filed A.S. No.781 of 1998 and third defendant has filed A.S. No.679 of 1999. First defendant has not filed any appeal. In A.S. No.781 of 1998 the plaintiff had filed a Memorandum of Cross Objection contending that the compensation awarded was inadequate. The following questions arise for consideration in these appeals: (1) Whether the finding of the trial court that the accident occurred due to the negligence of the defendants in

the suit is correct? and (2) Whether the first respondent plaintiff is entitled to get any additional compensation?

6. Plaintiff was a teacher working in Mount Carmel High School, Kottayam. She was residing on the eastern side of the Eranjal road. She had to walk through the said road for reaching the School and also for going back. At the place of occurrence the road lies north-south. Evidence on record shows that second defendant in the suit had dug trench on the western side of the road and heaped soil on the road. Third defendant also dug another trench on the eastern side of the road and the earth removed from the said trench was also heaped on the tarred portion of the road. Both the trenches were dug during October and November, 1991. According to the plaintiff those two trenches were kept open exposing general public to accidents. It was averred that there was no sign boards or light during night. The case of the plaintiff was that on 27.11.1991 while she was walking through the road she slipped and fell into the trench dug by the second defendant and sustained fracture on her leg and other injuries. According to her the accident occurred due to the

negligence of the defendants.

7. The case of defendants 2 and 3 was that they had taken all possible precautions to prevent accidents to the public. It was also their case that plaintiff alone was responsible for the accident, it was a self invited one and defendants 2 and 3 are not responsible for the accident.

8. Plaintiff gave evidence as P.W.1 and examined Pws.2 to 4. She gave evidence to the effect that the trench on the western side of the road was dug by the second defendant and the trench on the eastern side was dug by the third defendant. She also gave evidence to the effect that the mud removed from the trenches were heaped on the tarred portion of the road making it impossible for the pedestrians to walk through the road. According to her though she was walking very carefully through the western side of the road, she slipped and fell into the trench on that side. It was not possible for her to walk and the neighbours took her to a nearby house. Exhibit A10 series, which are the photographs proved by P.W.2 show the actual condition of the road on the date of accident. P.W.3 took plaintiff to the

hospital. He also gave evidence to the effect that the entire tarred portion of the road was covered with soil and the road was in such a condition for a pretty long time. Evidence of Pws.1 to 3 shows that vehicular traffic alone was blocked. But by heaping soil removed from the trenches on both sides of the road made it impossible even for the pedestrians to walk through the road. Photographs produced will show that people were walking through the road. On the side of the defendants, D.Ws.1 to 3 were examined. D.W.1 who was an Engineer working in the office of the second defendant had deposed that he was in charge of the cable lining work at the place of accident. He also deposed that the work was entrusted with a Contractor by name Mr.Sadasivan Nair. He further deposed that in spite of heaping of soil on the tarred portion it was possible for the pedestrians to walk through the road. Though he gave evidence to the effect that traffic was blocked and Department has placed sign boards cautioning the pedestrians, there is no material on record to substantiate that contention. On the other hand, his oral evidence shows that in spite of heaping of soil, pedestrians used to walk

through the road. Tarred portion of the road was having a width of 3 metres. The entire tarred portion was covered by soil removed from the trenches on either side. Third defendant examined D.Ws. 2 and 3. D.W. 3 was the Contractor. D.W.2 was the Assistant Executive Engineer, who was in charge of the trench work. During cross-examination he deposed that the earth removed from the trench was heaped on the tarred portion of the road on the side of the trench and in spite of the heaping of the earth, pedestrians could walk through that area. There is nothing in his evidence to show that defendants 2 and 3 had taken all reasonable precautions to prevent any accident. D.W.3 is the Contractor who had carried out the work. His evidence is of no help at all. The trial court which had occasion to watch the demeanour of the witnesses after elaborate discussion, found that the trenches were kept open by defendants 2 and 3 without proper care or precautions and because of the heaping of the soil on the tarred portion of the road, pedestrians like the plaintiff were compelled to walk through that part of the road and hence accident occurred. It was

found that all the defendants are equally liable.

9. Learned counsel appearing for the appellant in A.S.No.679 of 1999 argued that D.W.3 was the Contractor. It was he who actually executed the work and as per the terms of the agreement entered into between the third defendant and the Contractor, it was the duty of the Contractor to display boards and take necessary precautionary measures. It is argued that Exhibits B1 and B2 will show that he is solely responsible for the work and in spite of the specific contention raised in the Written Statement plaintiff did not implead the Contractor as a party in the suit and as such it is fatal to the plaintiff's case. It is also argued that the evidence on record shows that the plaintiff fell into the trench dug by the second respondent. It is argued that the plaintiff was walking through the western side of the road and as such the second defendant alone is liable for the damages, if any.

10. Work was done for and on behalf of defendants 2 and 3. They may either do it Departmentally or may get it done by awarding contracts. Merely because there were an agreements between the Contractor and defendants 2 and 3,

the plaintiff is not bound by the terms of any such agreements. The Contractor as well as the defendants are responsible. If there was any agreement between the third defendant and D.W.3, it may claim for reimbursement, if the claim is not barred by limitation. The fact that plaintiff did not implead the Contractor is not a ground to dismiss the suit. The evidence on record shows that the accident occurred due to the negligence of defendants 2 and 3.

11. Now I shall consider whether the quantum of compensation awarded was reasonable. Evidence on record shows that plaintiff sustained a fracture on the right leg and right leg was under plaster cast. Evidence also shows that plaster cast was removed after 1½ months. Subsequently, plaintiff had to undergo physiotherapy treatment till full rehabilitation. Evidence further shows that plaintiff sustained the fracture on the right leg on account of the slipping and falling into the trench dug by the second defendant in the suit. Plaintiff had claimed an amount of Rs.8,500/- towards compensation for loss of earning. Trial court has awarded Rs.6,500/- under that head. Counsel for defendants 2 and 3

have strenuously argued before me that there is absolutely nothing on record regarding the salary of the plaintiff as well as the duration of the treatment. Exhibit A16 certificate issued by the Headmistress of the School shows that plaintiff was drawing a monthly salary of Rs.2,839/-. Plaintiff averred that she could not go to the school for 3 months. There is evidence to show that on account of the fracture her right leg was under plaster cast for 1½ months and subsequently she had to undergo physiotherapy treatment. It is argued that plaintiff did not adduce evidence to show that she was on loss of pay leave. It is to be noted that plaintiff was a teacher in an aided school with vacation facility and as such she may not be having any eligible leave such as half pay leave, earned leave, etc. Even otherwise, it is not to the look out of the court whether the person claiming compensation lost any salary. The plaintiff could have surrendered the earned leave if the same was permissible or could have availed the same for other purposes. Trial court had awarded a sum of Rs.8,500/- towards compensation for loss of earning, which is quite reasonable. Plaintiff had claimed Rs.10,000/- towards

compensation for mental shock, agony, pain and suffering, etc. Trial court had awarded Rs.6,500/- under that count. For physical disability, Trial court awarded a sum of Rs.5,000/-. An amount of Rs.5,000/- was awarded towards treatment expenses. Amounts awarded under different heads are reasonable and does not call for any interference. So the decree passed by the trial court awarding a sum of Rs.25,000/- as compensation is legal and proper. The evidence discussed above shows that there is no merit in these appeals.

12. Learned counsel for the appellant in A.S. No.781 of 1998 has argued that the trial court has passed a decree against all the three defendants making them liable jointly and severally and on account of the interim order passed by this Court, the appellant had deposited a sum of Rs.25,000/-. In view of the decree passed by the trial court all the defendants are liable to pay the compensation equally. If any one of the defendants had paid the entire decretal amount, it has got a right to claim the contribution and recover the same from the other defendants. I make it clear that in view of the nature of the decree, each of the defendant is bound to pay 1/3rd of the

compensation awarded.

13. Plaintiff had filed a Cross Objection in the appeal filed by the second defendant. Suit was filed against three defendants. Decree is passed against three defendants. The decree was passed making the defendants jointly and severally liable. Defendants 1 and 3 are not interested in the outcome of A.S. No.781 of 1998. If the appellant is exonerated the entire amount will have to be shared by defendants 1 and 3. There is no Cross Appeal in the appeal filed by the third defendant. By allowing the Cross Objection filed by the plaintiff in the appeal filed by the second defendant other defendants cannot be made liable. In State of Kerala v. Padmavathi (1983 KLT 17) a Division Bench of this Court held that as a general rule a respondent can file a cross appeal only against an appellant; and it is only in exceptional cases the respondent could be allowed to urge a cross appeal against a co-respondent. It was further held that to fall within the category of exceptional cases the relief claimed against the appellant should be so intermixed with the relief to be granted to the co-respondent that the relief in the appeal

could not be granted without entertaining the cross appeal. So the Memorandum of Cross Objection filed by the plaintiff is not maintainable.

14. I have already found that the quantum of compensation awarded by the trial court under various heads were reasonable and no interference is called for. So there is no merit also in the Memorandum of Cross Objection and the same is also liable to be dismissed.

15. In the result, both the Appeals and the Cross Objection are dismissed. Parties are directed to bear their respective costs.

Civil Miscellaneous Petition Nos.3324 and 3614 of 1999 in A.S. No.781 of 1998 will stand dismissed.

K. PADMANABHAN NAIR, JUDGE.

vsv

K. PADMANABHAN NAIR, J.

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A.S. NO. 781 OF 1998
AND
A.S. NO 679 OF 1999

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J U D G M E N T

5TH JULY, 2007